(1)
Supreme Court, U.S.
FILED
00 749 NOV - 8 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

ALFAIR DEVELOPMENT COMPANY, INC.
and MAGGIE ALFORD,

Petitioners,

v.

CITY OF JACKSONVILLE, FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD L. NOWAK
Attorney for Petitioners
P.O. Box 50826
Jacksonville Beach, FL 32240
(904) 655-2894

163352

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

33 AP

QUESTION PRESENTED

Does the fact that the Petitioners, intended minority beneficiaries of a City of Jacksonville race based set aside program, were allowed to and did submit a bid on a set aside contract along with other bidders that the City of Jacksonville deemed to be members of the intended class of minority beneficiaries, preclude the Petitioners from having standing to challenge the constitutionality of the set aside ordinance for violation of the equal protection standards set out by this Supreme Court in *City of Richmond v. J.A. Croson Company*, 109 S. Ct. 706 (1989), 488 U.S. 469, 102 L. Ed. 2d 854? In particular, when the Petitioners allege and were allowed to present evidence at trial that the set aside ordinance as drafted and applied to set asides for "African-Americans" and "African-American Business Enterprises" violated the Petitioners' Fourteenth Amendment equal protection rights by not being "narrowly tailored" and allowing an "over inclusive" class of beneficiaries to submit bids on set aside contracts.

PARTIES TO THE PROCEEDING

The Petitioners are Alfair Development Company, Inc. and Maggie Alford.

The Respondents are the City of Jacksonville, Florida, the City Council of Jacksonville, Florida, Ed Austin and the Mayor of the City of Jacksonville, Florida.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Alfair Development Company, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
A. The Nature of the Case	2
B. Proceedings Below	3
C. Material Facts	4

Contents

	Page
Reasons for Granting the Writ	7
I. The Decision Of The Court Of Appeals Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be Decided By This Court And Which Further Conflicts With Relevant Decisions Of This Court.	7
A. Injury In Fact	11
B. Causal Relationship	12
C. Prospect Of Obtaining Relief	13
II. The Questions Presented Are Important And The Decision Of The Court Of Appeals Has A Particularly Debilitating Affect On Intended Beneficiaries Of A Set Aside Ordinance Who, While Able To Submit Bids Are Deprived Of Full Remedial Benefits By The Over Inclusiveness Of The Identified Class Of Allowed Bidders.	14
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Adarand Constructors, Inc. v. Pena, 155 S. Ct. 2097 (1995) 13

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) ..... *passim*

Northeastern Fla. Chapter Of The Associated Gen. Contractors Of Am. v. City Of Jacksonville, Fla., 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) 7, 9, 10

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) 13

Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, L. Ed. 2d 343 (1975) 14

United States Constitution:

Fourteenth Amendment ..... i, 1, 9

Statute:

28 U.S.C. § 1254(1) 1

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed August 10, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Middle District Of Florida, Jacksonville Division Dated And Filed January 31, 2000 ..... 4a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit opinion (App. A) was not reported. The district court opinion (App. B) was not reported.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 10, 2000.

The jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Nature of the Case

This is an action whereby the Petitioners presented to the district court a "case" or "controversy" that seek damages, declaratory and injunctive relief and challenges the constitutionality of City of Jacksonville Ordinance Number 92-1269-1132 as it specifically defines and was applied to "African-Americans" and "African American Business Corporations" in the award of a contact for City of Jacksonville, Project No. 92/440 on or about December 9, 1992.

The Petitioners alleged in their First Amended Complaint that the definitions of "African-American" and "African-American Business Enterprises" as enacted in Ordinance Number 92-1269-1132 do not properly take into account the precise scope of the injury and wrongs identified by the Disparity Study and the City Council's findings upon which the Ordinance was based. Further the Petitioners alleged that said definitions improperly and unconstitutionally allow equal participation by black, non-citizens who may come to Jacksonville from countries and with historical backgrounds that clearly place them outside of the group of African-Americans citizens who are the direct heirs to the effects of the discrimination that the set aside program established by the race based Ordinance seeks to remedy.

The Petitioners have also alleged in their First Amended Complaint that the definitions of "African-American" and "African-American Business Enterprises" as enacted, are not "narrowly tailored" to meet the constitutionally acceptable goals of the program established by the Ordinance and that

they are arbitrary and capricious, and have no basis or justification and result in an overly inclusive pool of minority participants.

The Petitioners First Amended Complaint also alleged that they have and continue to suffer harm in that their opportunities to benefit from the City of Jacksonville's set aside ordinance were diminished by the alleged unconstitutional inclusion of non-qualified participants in the set aside program.

The Petitioners also included allegations in their First Amended Complaint to show that they were not mere observers and non-participants in the set aside program established by the challenged ordinance, but had actually submitted a bid on the first contact opportunity offered under the set aside ordinance and that further they were the second lowest bidder. The contract actually being awarded to a bidder who was allowed to qualify and bid as a result of an overly inclusive and unconstitutional definition of the intended beneficiaries of the challenged race based set aside ordinance.

B. Proceedings Below

This case was submitted to trial on the merits on July 30, 1997 after pleadings were closed and pre-trial proceedings were completed. No pre-trial motions were filed or heard regarding the pleadings or regarding the Petitioners standing to sue or the district court's jurisdiction.

Two (2) years and six (6) months after trial the district court, issued its Order, dated January 31, 2000 (App. B), dismissing the Petitioners' First Amended Complaint with

prejudice for lack of jurisdiction and without findings of fact based on the evidence presented at trial or decision on the merits of the Petitioners' claim.

C. Material Facts

It was evident from public hearings held by the City of Jacksonville City Council and an underlying Disparity Study, that the City of Jacksonville recognized its ordinance was a race-conscious remedial program that must meet the "strict scrutiny" test and requirements set out by the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

The Disparity Study sought to identify the scope of injury stemming from past discrimination against minorities in the awarding of construction contracts. The Study found that since earlier generations of ethnic groups were inhibited or prohibited from acquiring valuable business and professional expertise and were limited in their ability to accumulate wealth, current levels of minority business are artificially low. Deprived of opportunities to acquire wealth, earlier generations of minorities were unable to provide intergenerational transfers of wealth and the resulting financial foundation upon which current generations of prospective entrepreneurs could launch successful businesses. The Disparity Study also found that personal financial capital of minorities has been limited by inequities inflicted upon prior generations. Limited personal wealth makes it exceedingly difficult to fund business starts or persuade local lending institutions to provide financial assistance.

As to a class or group labeled as "African-Americans" the City Council found historical racial discrimination in the City of Jacksonville business community, which resulted in a denial of fundamental opportunities, such as equality of education, particular employment, membership in majority controlled labor and craft unions, depravation of technical education, business experience and wealth accumulation required for successful entrepreneurial endeavors and the exclusion from public contracting opportunities, all of which was found to have created an under representation and a disparity in their participation in public contracting opportunities based upon the availability of qualified African-American business enterprises willing and able to perform.

"African-American" was defined as a person who has origins in the black racial groups of Africa, or considers and holds herself or himself out as a person having origins in the black racial groups of Africa.

"African-American Business Enterprise" was defined as a business, which is legitimately owned, operated and controlled by African-Americans, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under Section 126-606. The definition also stated that active participation in the business community of the City of Jacksonville created a presumption that the applicant has suffered from the effects of past discrimination within such business community.

The past discrimination found to have been practiced in the public sector by the City of Jacksonville and by others in the private sector spans a period of at least 157

years. This span of time or "time line" begins with the City of Jacksonville's first charter in 1832, which created race specific laws to the advantage of white male inhabitants, and continued with slave labor, vagrancy laws, segregation in public education, transportation, facilities and licensing.

The Disparity Study also found that to meet the test required by the Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), disparity must be evaluated within each specific minority group.

The Disparity Study found that from the very beginnings of the City of Jacksonville, and its first charter in 1832, City sponsored discrimination became a significant factor in determining the life chances and opportunities of African-Americans. The circumstances of which reflected the societal struggle between White citizens and American slaves and later "freedmen" and their descendants, which included the Black Codes, and all the related Federal legislation and court decisions dealing with attempts to transition the former slaves or "freedmen" from their position as mere chattel to human beings and citizens with full rights and privileges.

The specific incidence complained of by the Petitioners was the City of Jacksonville's application of the definition of "African-American" to include a certain Nigerian citizen who for the price of a plane ticket voluntarily immigrated to the United States in 1980 and voluntarily and improperly interject himself, for financial gain, at the end of the long "time line" of discrimination that neither he nor his ancestors experienced. Both he and his ancestors were in effect marked absent during the 157 years of societal struggle evidenced

in the City's Disparity Study and experienced by the Petitioners and their ancestors. Ancestors who were involuntarily brought to the United States as slaves and who were present in the United States during the entire "time line" of discrimination that is the basis for the set aside minority classification.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT AND WHICH FURTHER CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Court of Appeals and the district court have improperly seized upon language contained in this Supreme Court's decision in *Northeastern Fla. Chapter Of The Associated Gen. Contractors Of Am. v. City Of Jacksonville, Fla.*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993), a case brought by a member of an excluded class of bidders, *i.e.* an association of non minority contractors, and applied it to the instant case, brought by the Petitioners who are intended minority beneficiaries of the set aside ordinance.

To find as the district court and the Court of Appeals did, that the Petitioners' complaint and factual circumstances as alleged or shown at trial are analogous to the factual setting in *Northeastern Fla. Chapter Of The Associated Gen. Contractors Of Am. v. City Of Jacksonville, Fla.*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) is simply

erroneous. The Court of Appeals' finding that in order to have an injury in fact and standing the Petitioners have to allege that they were ". . . denied the opportunity to compete for a city contract on an equal footing or that the city intentionally discriminated against it on the basis of race . . ." is also erroneous and not reconcilable with this Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) and with the long line of this Supreme Court's cases on the doctrine of standing.

The instant case is unique in that, the Petitioners are not members of the excluded "majority" but are members of a minority classification or group for whom the set aside ordinance was specifically created to provide contract opportunities to the exclusion of all other racial groups. In light of these facts and reality, clearly members of the identified minority group are not going to be able to allege that they were ". . . denied the opportunity to compete for a city contract on an equal footing or that the city intentionally discriminated against it on the basis of race . . ." or that the set aside ordinance was a barrier or discriminatory policy which prevents them from bidding.

On the contrary, the Petitioners as members of the identified minority class were permitted to bid and as to the excluded majority, the Petitioners were by design given an un-equal footing or advantage over the excluded majority. In addition by design the City of Jacksonville was intentionally discriminating in favor of and not against the Petitioners as to set aside contracts.

The fundamental requirements of standing and injury in fact that this Supreme Court has set out in its decisions and also summarized in *Northeastern Fla. Chapter Of The Associated Gen. Contractors Of Am. v. City Of Jacksonville, Fla.*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) must be applied in the context in which these Petitioners found themselves.

Clearly this Supreme Court was not engaging in idle discussion when it set out the specific conditions under which a race based set aside ordinance would be considered a constitutionally sanctioned exception to the equal protection provisions of the Fourteenth Amendment to the United States Constitution. And certainly the intended minority beneficiaries of such set aside ordinances must have a right to enforce and demand the equal protection of the law resulting from this Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

If the constitutionality of a race based set aside ordinance depends on the narrowly tailored creation and distribution of its remedial benefits to a narrowly tailored and identified minority class, do not members of the identified minority class have standing to seek judicial redress and are they not "injured in fact" when a set aside ordinance as written or applied creates an over inclusive class of minority beneficiaries in violation of the standards set out by this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)?

Yes, those minority members who are properly within the identified class are allowed to submit a bid, but the injury in fact and consequent standing comes from the fact that

they have to improperly compete for their intended benefits with other bidders who are not properly included.

If the phrase "equal footing" used in *Northeastern Fla. Chapter Of The Associated Gen. Contractors Of Am. v. City Of Jacksonville, Fla.*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) is to be used in the context of this instant case, it must mean the ability to bid equally with only those who are properly included as a member of an intended minority or protected class identified by the set aside ordinance. A clear requirement for the constitutionality of a set aside ordinance under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

Yes, the Petitioners seek in one count of their First Amended Complaint, damages for having lost a contract to a bidder not properly included as a member of the set aside class defined by the Ordinance as "African-American" or "African-American Business Enterprise". However, why is this an impediment to showing injury in fact and attaining standing to seek relief? Just because members of the excluded class can attain standing and show injury in fact without having to actually participated in the bidding process, does not change the fact that those who actually do participate as a minority bidder and actually are damaged by the over inclusiveness of the class of allowed bidders, have in fact suffered injury. Injury which has been clearly alleged and shown by the Petitioners in the instant case.

To deny claimants such as the Petitioners their day in Court, is to deny them the equal protection of the laws as define by this Supreme Court and also to cause injury to those excluded from bidding on a set aside contract. This is because the excluded bidders' rights to equal protection of

the laws are being denied in vein, since the intended beneficiaries are not getting the full benefit of the set aside.

If indeed a vital test of the constitutionally of a set aside ordinance is that the intended beneficiaries be properly identified and that the race conscious remedy of set aside be narrowly tailored to an identified and not over inclusive class of beneficiaries, then who can be better qualified to have standing than an alleged proper member of the intended minority class? A minority bidder who actually does submit a bid and who suffers injury in fact as a direct result of the complained of over inclusiveness.

The Petitioners have met this Supreme Courts standing requirements.

A. Injury In Fact

The injury in fact, that the Petitioners have alleged in their First Amended Complaint, includes, having to compete for set aside contract opportunities with those not properly beneficiaries under the "strict scrutiny" and "narrowly tailored" test of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989). Specifically in the case of the 1992 Ordinance and Bid No.: MC-0021-93, by having the particular contract awarded to a firm not properly a beneficiary of the same contract bidding opportunity. Said injury is concrete and particularized and not conjectural or hypothetical. To the extent the definitions of "African-American" and "African-American Business Enterprise" are improper, overly inclusive and or vague they will continue to form an improper and unconstitutional governmental barrier to the Petitioners' constitutionally guaranteed rights in future bidding opportunities.

Petitioners' First Amended Complaint, which clearly defines the nature of the injury in fact complained of and which the Petitioners maintain is sufficient to support a finding of and a complaint of "unequal treatment", and a showing of a denial of equal treatment. Especially when proper notice is taken that since this Supreme Court has defined what "equal treatment" and "equal protection" shall mean and how it will be determined in the context of race based set aside programs. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) A claim that those United States Supreme Court standards have been violated, is by definition a claim of "unequal treatment" and a denial of equal treatment if not uniformly followed in all states and municipalities, and a claim that must be decided on its merits to be ultimately determined.

B. Causal Relationship

A causal relationship between the Petitioners' injury in fact and the challenged Ordinances or "governmental barriers" has been alleged and established by the record and by Petitioners' having to bid on a set aside contract with an individual and firm not properly a part of the intended beneficiaries of the race based program. In the case of the contract awarded by the City of Jacksonville on Bid No.: MC-0021-93, the fact that, but for the improper inclusion of the alleged non-qualifying bidder, the Petitioners would have been the low bidder and awarded the contract. These alleged and established facts provide a clear nexus to and are fairly traced to the challenged improper definitions of "African-American" and "African-American Business Enterprise" and the unconstitutional government barriers or Ordinances.

C. Prospect Of Obtaining Relief

And lastly the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative," in that a favorable ruling would result in monetary damages, an injunction against the continued application of the improper definitions and a vindication of the constitutional rights of the Petitioners.

The Petitioners, by their First Amended Complaint, and the evidence produced at trial, when properly considered in the context of the facts of this instant case, have complied with more than the minimum requirements of standing, including "injury in fact". A proper "case" or "controversy" has been presented and therefore the district court and the Court of Appeals and this Supreme Court have jurisdiction to deal with the Petitioners' claims, on their merits.

The Petitioners are merely seeking to obtain the Fourteenth Amendment protections and guarantees, which this Supreme Court also confirmed in *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994), and *Adarand Constructors, Inc. v. Pena*, 155 S. Ct. 2097 (1995).

In the instant case, the City of Jacksonville is illegitimately using race to eradicate the effects of private discrimination. In particular and as alleged and proved by the Petitioners at trial, the City of Jacksonville has improperly, without proper foundation in evidence and contrary to its own Disparity Study, established and implemented a definitions of "African- American" and "African-American Business Enterprise" that are overly broad and fail to meet the "strict scrutiny" and "narrowly

tailored" tests of the United States Supreme Court *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)

II.

THE QUESTIONS PRESENTED ARE IMPORTANT AND THE DECISION OF THE COURT OF APPEALS HAS A PARTICULARLY DEBILITATING AFFECT ON INTENDED BENEFICIARIES OF A SET ASIDE ORDINANCE WHO, WHILE ABLE TO SUBMIT BIDS ARE DEPRIVED OF FULL REMEDIAL BENEFITS BY THE OVER INCLUSIVENESS OF THE IDENTIFIED CLASS OF ALLOWED BIDDERS.

While the illegitimate and unconstitutional use of race as complained of by the Petitioners, is also the basis of complaint by excluded majority contractors, who are denied the opportunity to bid on contracts set aside under the Ordinances, it is even more egregious to minority contractors, such as the Petitioners, who are being denied the full measure of benefits that are suppose to be the very justification for the use of race based set asides.

The Petitioners believe that the district court's and Court of Appeals' decisions in this case reflect an unfortunate reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of the challenged Ordinance. A reluctance that Justices Brennan, White and Marshall noted in their dissenting opinion in *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, L. Ed. 2d 343 (1975) and found to be improper.

Yes, the Petitioners were able to submit a bid under the challenged Ordinances, but that physical act does not even begin to equate to "equal treatment", "equal protection" or answer or become dispositive of the fundamental constitutional questions raised by the Petitioners' Amended Complaint and the evidence produced at trial. Questions raised by claims, not from a remote trade organization or a plaintiff with tenuous ties to the set aside program, but a black, minority contractor that did participate and did sustain clear injury in fact.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. NOWAK
Attorney for Petitioners
P.O. Box 50826
Jacksonville Beach, FL 32240
(904) 655-2894

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 10, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11265
Non-Argument Calendar

D.C. Docket No. 95-00558-CIV-J-21B

ALFAIR DEVELOPMENT COMPANY, INC., a Florida Corporation, MAGGIE ALFORD, individually,

Plaintiffs-Appellants,

versus

CITY OF JACKSONVILLE, FL, a Florida municipal corporation, CITY COUNCIL OF JACKSONVILLE, FLORIDA, as the duly constituted governing body of the City of Jacksonville, Florida, ED AUSTIN, individually and as Mayor of the City of Jacksonville, Florida, MAYOR OF THE CITY OF JACKSONVILLE, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(August 10, 2000)

Before BIRCH, CARNES and BARKETT, Circuit Judges.

Appendix A

PER CURIAM:

Alfair Development Company, Inc., and Maggie Alford, the sole owner of Alfair (collectively, "Alfair"), appeal the dismissal of their suit for lack of standing. In its complaint, Alfair claimed that, after making a bid as an "African-American business enterprise" under the City of Jacksonville, Florida's, minority set-aside program, it lost a construction contract to a bidder that qualified as a minority business but was allegedly not an intended beneficiary of the program. Alfair asserted that the majority owner of the winning firm was Nigerian-born and had not been harmed by the city's past discrimination. Alfair challenged the city's criteria for qualifying minority firms as too broad to meet the constitutional test that governs the permissible use of race in public contracting. Alfair's suit alleged that the City of Jacksonville, et al., violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*,* 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment.

A party's standing to bring suit is a question of law subject to our *de novo* review. *See Florida Ass'n of Medical Equipment Dealers v. Apfel*, 194 F.3d 1227, 1229 (11th Cir. 1999). In order to establish standing, a plaintiff must show

---

* Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. A plaintiff in a Title VI suit, suing under the statute alone, must prove intentional discrimination, as is required in an equal protection suit. *See Sandoval v. Hagan*, 197 F.3d. 484, 507 n.24 (11th Cir. 1999).

injury in fact, *see id.*, that is, an invasion of a legally protected interest that is "concrete and particularized" and "actual and imminent, not conjectural or hypothetical," *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663, 113 S.Ct. 2297, 2301-02, 124 L.Ed.2d 586 (1993).

Alfair contends that it suffered the requisite injury in fact to establish standing because, under the city's program, it was required to compete in the bidding process with a non-minority firm that ultimately won the contract. In an analogous setting, the Supreme Court has explained, however, that "the 'injury-in-fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract," and that, to establish standing, a plaintiff should show that a discriminatory policy prevents it from bidding on an equal basis. *See Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. at 666, 113 S.Ct. at 2303 (holding that, in an equal protection challenge brought by members of construction industry association, group had standing to challenge Jacksonville set-aside program, although members had not established that they would be awarded contracts if set-aside was eliminated). We find this reasoning persuasive. Because Alfair does not allege that it was denied the opportunity to compete for a city contract on an equal footing or that the city intentionally discriminated against it on the basis of race, we conclude that Alfair failed to establish an injury in fact, and thus, lacked standing to challenge the constitutionality of the Jacksonville program. For the same reason, we also conclude that Alfair lacked standing with respect to its Title VI challenge.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DATED AND FILED JANUARY 31, 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3:95-cv-558-J21B

ALFAIR DEVELOPMENT COMPANY, INC., a Florida corporation, and MAGGIE ALFORD, individually,

Plaintiffs,

v.

CITY OF JACKSONVILLE, FLORIDA, a Florida municipal corporation; THE CITY COUNCIL OF JACKSONVILLE, FLORIDA, as the duly constituted governing body of the City of Jacksonville, Florida; and ED AUSTIN, individually and as Mayor of the City of Jacksonville,

Defendants.

ORDER

Plaintiffs bring this action against the Defendants pursuant to Title 42 U.S.C. § 2000d, et seq. (Title VI of the Civil Rights Act of 1964), 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States. This action was tried to the Court sitting without a jury. The Court has considered the testimony and evidence

presented herein, the arguments of counsel and their written submissions, and the applicable authorities. The Court sets forth its findings and conclusions in the balance of this Order.

I. Factual Background

The Plaintiffs[1] complain that a construction project for which it submitted a bid was wrongly awarded by the Defendants to Environmental Services Contractors, Inc. ("ESC"). The Plaintiffs allege that ESC should not have been among the companies certified by the Defendants to bid for a construction project, which was only available to African-American owned entities. ESC was permitted by the Defendants to submit a bid, according to the Plaintiffs, due to the improper and unconstitutional definition of two terms, "African-American" and "African-American Business Enterprises". As a result of the overly broad definitions enumerated by the Defendants, the Plaintiffs assert ESC was permitted to bid on the project, and was ultimately selected, despite having never suffered the effects of discrimination which the Ordinance at issue was designed to remedy.

City of Jacksonville Ordinance Number 92-1269-1132 ("Ordinance") was enacted by the City Council on October 27, 1992. This Ordinance repealed the existing Part 6, Chapter 126 ("Minority Business Enterprise Participation") of the Jacksonville Ordinance Code and added a new Part 6 to Chapter 126 entitled "African-American and Women's Business Enterprise Participation". In accordance with this

---

1. Ms. Maggie Alford was the sole owner of Alfair Development Company, Inc.

Appendix B

Ordinance, selected city contracts were reserved for exclusive bidding by pre-approved black- and female-owned companies.[2]

In order to be pre-approved under the program, an applicant had to assert that he or she was the legitimate owner of an African-American business enterprise and that the applicant had suffered from the effects of past discrimination with the business community of the City of Jacksonville.

The term "African-American" was defined in the Ordinance as a person "who has origins in the black racial groups of Africa, or considers and holds herself or himself out as a person having origins in the black racial groups of Africa." Ordinance Number 92-1269-1132, Part 6, Chapter 126.

The term "African-American Business Enterprise" was defined in the Ordinance as a "business which is legitimately owned, operated and controlled by African-Americans, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under s. 126.606." *Id.*

The Ordinance further created a presumption that the applicant had suffered from the effects of past discrimination if they were an active participant in the business community.

---

2. Ordinance Number 93-722-342, which was enacted on June 22, 1993, further amended Part 6, Chapter 126, by providing separate remedial benefits to minority groups defined as Asian-American, Hispanic-American and Native American.

Appendix B

Both ESC and the Plaintiffs had been certified by the Defendants to compete in the Defendant's Equal Business Enterprise Program.

ESC was owned by Bandele M. and Patricia M. Onasanya.[3] Mr. Onasanya was a native of Nigeria and had immigrated to the United States in 1980. He was not a naturalized American citizen. Mrs. Onasanya was born in the United States and traced her genealogy to Africa. Together, the two had founded ESC and had been in business in Jacksonville since 1985. The Plaintiffs' company has been doing business in Jacksonville since 1983.

The first construction project released for bid by the Defendants pursuant to the Ordinance was Continuous Sidewalk Construction Bid No.: MC-0021-93, Bid Date: 12/9/92, Project No.: 92/440. Only four certified companies bid on this construction project. The lowest bidder on the project was ESC. The Plaintiffs were the second lowest bidder. The Defendants awarded the construction project to ESC.

II. Jurisdiction

Article III of the United States Constitution limits federal judicial power to adjudication of "cases" or "controversies." U.S. Const. Art. III, § 2. This requirement restricts the courts to justiciable cases and enforces the Constitution's separation of powers function. *Steel Co. v. Citizens for a Better Env't*,

3. Conflicting pieces of evidence regarding the true percentage of ownership between the husband and wife were received by the Court, however, this point does not require final resolution in view of the Court's rulings herein.

523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The initial question the Court must resolve is whether the Plaintiffs have standing to sue. 523 U.S. at 102, 118 S.Ct. at 1016, 140 L.Ed.2d at 232.

The requirements for standing were addressed by the United States Supreme Court in a decision that involved the same City of Jacksonville Ordinance under attack in this case. *See Northeastern Fla. Chapter of The Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

A party seeking to invoke federal court jurisdiction must satisfy, at a minimum, three requirements:

> 1) "[I]njury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical";
>
> 2) [A] causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has hot resulted "from the independent action of some third party not before the court"; and
>
> 3) [A] likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

508 U.S. at 663-64, 113 S.Ct. 2302, 124 L.Ed.2d at 595-96, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450, 464 (1976); *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984).

After specifying the minimum requirements for standing, the Supreme Court then discussed three of its prior holdings addressing the issue of standing.[4] 508 U.S. at 664-65, 113 S.Ct. at 2302-03, 124 L.Ed.2d at 596-97. The Supreme Court held those three cases stood for the following proposition:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" element in an equal protection claim is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

508 U.S. at 666, 113 S.Ct. at 2303, 124 L.Ed.2d at 597.

---

4. *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970); *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

In reaching its decision in *Northeastern*, the Supreme Court distinguished its prior decision in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), in which the Court determined that the plaintiffs did not possess standing. The majority in *Northeastern* concluded that the plaintiffs in *Warth* did not complain because they could not compete equally; rather they complained because they did not win. 508 U.S. at 668, 113 S.Ct. at 2304, 124 L.Ed.2d at 598. That is similar to the facts the Court is presented with in this case.

The Plaintiffs do not complain they were prohibited from competing by a government barrier. Nor do the Plaintiffs complain that they were afforded unequal treatment. Rather, the Plaintiffs complain because a third party, ESC, was given an opportunity to compete and won. Therefore, because the Plaintiffs cannot show they were **denied** equal treatment, it necessarily follows that they cannot satisfy the initial requirement of standing — injury in fact.

III. Conclusion

Upon consideration of the foregoing, the Court concludes that the Plaintiffs have failed to satisfy the jurisdictional requirement of standing. Accordingly, it is hereby **ORDERED** that: Plaintiff's Amended Complaint (Dkt. 3) is **DISMISSED WITH PREJUDICE** for lack of jurisdiction.

DONE AND ORDERED, at Jacksonville, Florida, this 31st day of January, 2000.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
United States District Judge